(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1226

TRAVIS J. BATTLES, RECEIVER OF CASUALTY UNDERWRITERS AND OF UNDERWRITERS AGENCY
Petitioner

VS.

BRANIFF AIRWAYS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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The Petitioner above named prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in this cause on December 8, 1944.

QUESTIONS PRESENTED

1. Did the Court below give full faith and credit to the class decree of the Texas Court which awarded recovery against all subscribers of the Association as a class during the time Braniff was a subscriber thereat for the assessment in question?

2. Did the Court below give full faith and credit to Article 4913 of the Texas Revised Statutes, which provides that any agreement not contained in the subscriber's policy and application is void and of no effect?

3. Was the Court below right in holding that Braniff's side agreement, which was not contained in either its policy or application, conferred sufficient rights upon Braniff as to have the effect of depriving it of due process in the aforesaid class proceedings?

4. Was the Court below right in holding that respondent's suit for premiums was barred by statute of limitations?

OPINIONS BELOW

The District Court's opinion (R 141) embracing findings and conclusions is reported in 54 Federal Supplement 422. The opinion of the Circuit Court of Appeals (R 160) is reported in 146 F. (2d) 336.

JURISDICTION

The judgment of the Circuit Court of Appeals (R 160) was entered on December 8, 1944. A motion for rehearing

was denied February 6, 1945 (R 185). Jurisdiction to issue this writ rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

Casualty Underwriters was a Texas reciprocal insurance exchange operated by Underwriters Agency, Inc., the attorney in fact. Respondent proved, over objection, that on June 4, 1937, it made verbal arrangements with the exchange providing, among other things, for the issuance of a policy of Workmen's Compensation insurance for $100.00. Thereafter on June 16th the Respondent made written application for insurance (R 53). A Workmen's Compensation Policy was issued to it on June 18th (R 60). Neither the policy nor the application embodied the prior agreement. On the contrary, both (R 53, 60) were on forms in use at the exchange and filed with the Board of Insurance Commissioners (R 27, 28, 133).

The Respondent's application embodied a power of attorney and subscriber's agreement providing that Respondent would pay its pro-rata part of the losses and expenses incurred at the exchange as consideration for said insurance (R 57, 58). The application estimated that the estimated annual premium would be $17,318.00. The policy made the written application a part thereof (R 73) and contained the same premium rates (R 62) as prescribed by the Texas Board of Insurance Commissioners (R 77). The policy recited that the consideration therefor was the

exchange of indemnity. Respondent gave notice to the Texas Industrial Accident Board that it held the policy (R 80); the policy was in force until June 4, 1938. No premiums were paid on the policy beyond the $100.00; it was stipulated that the amount of premiums booked and earned under the policy in accordance with its terms amounted to $20,000.00 (R 84). The assessment was for 60 per cent of the premium (R 46).

The exchange was placed in receivership in a suit brought by the Attorney General of Texas (R 29). On order of the Court (R 30), the Receiver brought a class suit against the subscribers to establish their liability for the debts of the exchange. In said cause it was adjudicated (R 31-51) that the defendants therein named were proper representatives of all other subscribers at the association during the period from January 1, 1937, to August 11, 1938 (R 48); that the subscribers under their reciprocal contracts became liable for the losses and expenses incurred at the exchange (R 36), and that each subscriber's pro-rata part thereof was 60 per cent of the premiums booked and earned on his policies of insurance thereat during the aforesaid period (R 44). The receiver was awarded judgment against the subscribers as a class for an assessment in this amount (R 46).

Braniff contends that it is not bound by this class decree because of the aforesaid verbal understanding; that due process prevents it from being bound thereby. These contentions were upheld in the lower Courts.

Braniff's policy provided:

> "Any contract or agreement not written into this form shall be void and have no effect." (R 75.)

Petitioner urged in the lower Courts that under the parol evidence rule the evidence of this verbal arrangement was incompetent to vary Braniff's written contracts; that even if said side arrangement were established by competent evidence, it could have no effect under Article 4913 of the Texas Statutes, which provides:

> "Any contract or agreement not written into the application and policy shall be *void and of no effect* * * *."

Braniff made the same written application and subscriber's agreement (Pl. Ex. 13; R 53, 57) and accepted the same type of insurance policy (Pl. Ex. 14; R 60) in use at the exchange (Pl. Exs. 1, 2, 3; R 27, 132) and found in the class decree (Pl. Ex. 11; R 31, 35). It is the Receiver's contention that as a matter of law Braniff was a party to the identical contracts found in the decree and made by the other subscribers, and as a matter of law is a member of the class and bound by the decree.

In the assessment decree it was adjudicated:

> "* * * that any contract, agreement, arrangement or understanding between any Subscriber at said exchange and the attorney-in-fact or the association whereby the liability of the said Subscriber for assessments was eliminated, modified or released con-

> stitute no defense to the assessment here adjudicated in favor of the plaintiff." (R 50.)

The Court below found that it was adjudicated in the class decree that there were *exactly* 6508 subscribers in the class and liable for the assessment; that these 6508 subscribers were listed on an exhibit referred to in the decree, and that the decree is against these 6508 subscribers and no others; that the decree was not against Braniff because it was not on the exhibit.

This finding is not supported by the record. The exhibit referred to is not in evidence; the total amount of premiums earned on the policies of the subscribers in the exhibit is not in evidence; there is no adjudication in the decree as to the number of subscribers appearing on the exhibit; nor does the record show the number of subscribers on the exhibit; there is no adjudication in the decree of the exact number of subscribers belonging to the class in question. The class decree found there were *approximately* 6508 members of the class liable for the assessment (R 38), and that all subscribers at the exchange during the period from January 1, 1937, to August 11, 1938, were bound thereby, whether specifically mentioned or not (R 46). The decree provided:

> "* * * those Subscribers who are not named herein are properly and truly represented by these Subscribers who are named and answering herein so that all of the Subscribers at Casualty Underwriters during the aforesaid period are legally bound by this judgment." (R 48.)

Braniff authorized the attorney-in-fact to reinsure any risk (R 57, par. 2). The reinsurance of Braniff's Workmens' Compensation Policy is consistent with its reciprocal undertaking and does not mitigate Braniff's liability as an insurer of others.

The reinsurance contracts issued by Lloyd's of London were at rates substantially lower (R 107, 117) than the rates in Braniff's Workmen's Compensation Policy (R 62) and prescribed by the Texas Insurance Commission (R 77). The first policy was originally issued to Braniff prior to its membership in the reciprocal exchange, and was converted into a reinsurance policy to Casualty Underwriters on July 30, 1937 (R 108). There is no evidence that Braniff thereafter paid the premiums thereon. The second reinsurance policy (Def. Ex. 5; R 114) recites payment of premiums by Casualty Underwriters. There is no evidence that Braniff paid these premiums. No claim for credit or offset is here presented.

The Court held that the claim for premiums was barred by the four-year statute of limitations. Braniff's policy provided that it would submit a payroll report to the Association at the end of the policy period; that its premiums would be calculated therefrom, whereupon they would be paid (R 68). It never submitted the payroll report. Respondent gave excuses (R 87, 91) and refused on September 7, 1943 (R 94) to furnish the payroll report. This suit was filed October 5, 1943 (R 3). It was the Petitioner's contention that the contingency upon which the premiums became due and payable never happened; that Braniff,

having withheld and concealed the information from which the Receiver could compute the premiums, is in no position to urge the four-year statute of limitations; that the agreement and arrangement with its own agent, the attorney-in-fact, by which these premiums were concealed and withheld is a fraud against the insurance laws of Texas, and against the workmen, doctors, hospitals, and the other creditors of the exchange now entitled to be paid.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In failing to give full faith and credit to the class decree as required by Article 4, Section 1, of the Constitution of the United States.

2. In failing to give full faith and credit as required by Article 4, Section 1, of the Constitution of the United States, to Article 4913 of Texas Revised Statutes.

3. In holding that the prior parol agreement (which was an utter nullity) had the legal effect of placing Braniff in a class different from the other subscribers, and conferred upon it a defense to the assessment suit.

4. In holding that Braniff was not accorded due process in the class proceedings, and is not bound thereby.

5. In holding that the prior parol agreement fixed the legal rights and status of Braniff and over-rode the application and insurance policy under which Braniff lived.

6. In finding competent evidence in support of the parol agreement.

7. In construing the class decree to hold that no recovery was therein awarded the receiver against Respondent for assessment.

8. In holding that it was found and adjudicated in the class decree that there were exactly 6508 members of the class, and those members were set forth in the exhibit and made a part of the decree.

9. In sustaining Braniff's plea of limitations to the suit for premiums.

REASONS FOR GRANTING THE WRIT

1.

In holding that Braniff is not bound by the assessment decree of the State Court, the lower Court has decided an important Federal question in a manner not supported by this Court, and in conflict with such decisions of this Court, and of the lower Federal Courts and State Supreme Courts as bear upon the question.

The lower Court failed to accord full faith and credit to the class decree of the State Court as required by Article 4, Section 1, of the Constitution of the United States.

The lower Court's decision in this respect is contrary to the decisions of this Court in *Magnolia Petroleum Company vs. Hunt*, 320 U. S. 430; 64 Sup. Ct. Rep. 208; *Hart-*

ford Life Ins. Co. vs. Ibs, 237 U. S. 662; 35 S. Ct. 692; 59 L. Ed. 1165; and *Supreme Tribe of Ben Hur vs. Cauble,* 255 U. S. 356; 41 S. Ct. 339; 65 L. Ed. 673.

The opinion of the lower Court in holding that the subscriber is not bound by the class decree is not in accord with the opinion of the Circuit Court of Appeals for the Seventh Circuit in *Irwin vs. Missouri Valley Bridge & Iron Co.,* 19 Fed. (2) 300.

The holding in this respect is also in conflict with the Texas decision of *Southern Ornamental Iron Works vs. Morrow,* 101 S. W. (2) 336, which was approved by the Supreme Court of Texas by refusing the application for writ of error.

2.

The lower Court in holding that Braniff was not accorded due process in the class proceeding in the State Court, decided an important Federal question in a way not sanctioned by Article 4, Section 1, of the Constitution of the United States. The holding is also contrary to the above authorities.

3.

In holding that the side agreement afforded Braniff effective means of escape from the class proceeding, the Court failed to give full faith and credit to Article 4913 of Texas Revised Statutes, which provided that such an agrement is void and is of no effect.

The Court also failed to give full faith and credit to the class decree which adjudicated that such an agreement was no defense to the assessment therein levied.

The opinion of the lower Court in giving force and effect to the parol side agreement is in conflict with the following decisions of the Texas Courts:

English Freight Co. vs. Knox (Civ. App.), 180 S. W. (2) 633, writ refused for want of merit;

Daniel et al. vs. Tyrrell & Garth Inv. Co. (Tex. Sup. Ct.), 93 S. W. (2) 372;

Mulkey et al. vs. Traders & General Ins. Co. (Civ. App.), 93 S. W. (2) 582, writ of error refused;

Texas Employers Ins. Ass'n vs. Jones (Civ. App.), 70 S. W. (2) 1014, writ of error dismissed.

The holding is also in conflict with the lower Court's prior decision in the case of *Bowen Motor Coaches et al. vs. New York Casualty Co.*, 139 Fed. (2) 332.

4.

In finding that the evidence of the prior parol side agreement was competent to vary the term of Braniff's written contracts, the holding of the lower Court is in conflict with the following decisions of the Supreme Court of Texas:

Super-Cold Southwest Co. vs. Elkins, 166 S. W. (2) 97;

Distributors Inv. Co. et al. vs. Patton (Adopted), 110 S. W. (2) 47.

It is also in conflict with the opinion of the lower Court in the case of *Southwestern Packing Co., Inc., vs. Cincinnati Butchers Supply Co.*, 139 Fed. (2) 201.

5.

In construing the language of the assessment decree as not being against Braniff, the lower Court's decision is in conflict with the decision of the Supreme Court of Texas in the case of *Sun Oil Co. vs. Burns et al.* (Adopted), 84 S. W. (2) 442. It also overlooks the plain provisions of the decree.

6.

In holding that the Petitioner's claim for premiums was barred by the four-year statute of limitations, the Court's opinion is not in accord with the following Texas decisions:

Robertson vs. Cates (Sup. Ct.), 12 S. W. 54;

Stribling vs. Moore (Civ. App.), 76 S. W. 593;

Glenn H. McCarthy vs. Knox, Receiver, No. 11674, by the Galveston Court of Civil Appeals—not yet reported.

In failing to hold the premiums were not reported, charged or paid, under a conspiracy and fraud against the creditors which prevented the running of the statute until discovery, the holding is probably contrary to *McCarthy*

vs. Knox, supra, and the holding of this Court in *Bailey vs. Glover*, 21 Wall. 343; 22 L. Ed. 636.

7.

The opinion of the lower Court permits the circumvention of the insurance laws of Texas. It permits a subscriber under the Workmen's Compensation laws to make a written reciprocal contract for Workmen's Compensation insurance, to file it with the Industrial Accident Board, and to live under it without being bound thereby. It permits an underwriter at a reciprocal exchange to evade his written obligation to the creditors thereat by means of a verbal understanding with his own agent, the attorney-in-fact. (*Southern Ornamental Iron Works vs. Morrow*, 101 S. W. (2) 336, paragraph 8, at page 344.)

This agreement, an utter nullity by statute, Article 4913, is the vehicle by which the subscriber is permitted to escape the assessment proceedings. The indemnity extended by Braniff to the workmen, hospitals, doctors and other creditors thus goes unsatisfied. The result is that each creditor by loss of Braniff's pro-rata part of his claim must supply the capital for Braniff's venture in the insurance business. The extent of the operation of reciprocal exchanges in this country renders the questions presented of great importance.

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted to review the judgment of the Court below.

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BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals and the opinion of the District Court are cited in the petition.

JURISDICTION

The grounds on which jurisdiction of this Court is invoked are stated in the petition.

STATEMENT

The statement of the case has been set forth in the petition, and in the interest of brevity is not repeated here.

ARGUMENT

I

THE FAILURE TO GIVE FULL FAITH AND CREDIT TO THE ASSESSMENT DECREE

The assessment decree is entitled to the same faith and credit as is accorded it in the Texas Courts. *Magnolia*

Petroleum Co. vs. Hunt, 320 U. S. 430; 64 Sup. Ct. Rep. 208. In Texas the decree is res adjudicata as to everything therein adjudicated. The adjudication of jurisdiction, as well as liability, is entitled to absolute verity. *Southern Ornamental Iron Works vs. Morrow* (WE/Ref.), 101 S. W. (2) 336; *Gray vs. Moore* (WE/Dis.), 172 S. W. (2) 746.

The Receiver was awarded recovery against all the aforesaid subscribers as a class, whether named or not (R 46). This recovery was against those not named on the exhibit as well as those who were named thereon. *Sun Oil Co. vs. Burns* (Adopted—Tex. Sup. Ct.), 84 S. W. (2) 442.

The lower Court's construction overlooks that the number of subscribers in the class was approximated (R 38), and that the number of subscribers on the exhibit is not shown, and the total premiums on the exhibit are not shown.

The decree provided:

> "* * * The judgment hereby rendered is, therefore, against each and every Subscriber at Casualty Underwriters during such period of time from January 1, 1937, to August 11, 1938, inclusive, or any portion thereof in favor of the plaintiff for such assessment therein determined and adjudicated to be due, which sum is here fixed as the liability for assessment against each such defendant Subscriber, whether named herein or represented as a class." (R 47.)

The adjudication in the class decree that side agreements or understandings between any subscriber and the attorney-in-fact or the association constituted no defense to the assessment therein adjudicated (R 50) shows that the Court in the class decree had passed upon the identical question decided in the Courts below. The language of this Court in the case of *Supreme Tribe of Ben Hur vs. Cauble*, 255 U. S. 356; 41 Sup. Ct. 339, is appropriate:

> "* * * If the decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree."

II

DUE PROCESS AND ARTICLE 4913

The lower Court's holding that Braniff acquired legal rights under the side agreement sufficient to deprive it of due process in the assessment proceedings fails to give full faith and credit to the Texas decree. It also fails to give full faith and credit to the Texas Statutes. Article 4913 provides:

> "The Commission shall prescribe a uniform policy for workmen's compensation insurance and no company or association shall thereafter use any other form in writing workmen's compensation insurance in this State, * * * and any contract or agreement *not written* into the application and policy shall be *void and of no effect* and in violation of the provisions of this chapter, and shall be sufficient cause for revocation of license to write workmen's compensation insurance within this State."

This statute is expressly applicable, Article 4917:

> "The words 'Company' and 'Association' used in this Act mean * * * any reciprocal, or any inter-insurance exchange, authorized to write Workmen's Compensation Insurance in this State."

Texas Courts do not permit insurance contracts to be modified by parol side agreements. *English Freight Co. vs. Knox* (Civ. App.), 180 S. W. (2) 633; *Mulkey vs. Traders and General Ins. Co.* (Civ. App.), 93 S. W. (2) 582, writ refused; *Texas Employers Ins. Co. vs. Jones* (Civ. App.), 70 S. W. (2) 1014; an agreement contrary to statute is void, *Daniel vs. Tyrrell & Garth Investment Co.* (Texas Supreme Court), 93 S. W. (2) 372.

See also the ruling of the lower Court in *Bowen Motor Coaches vs. New York Casualty Co.*, 139 Fed. (2) 332.

Under Texas decisions, evidence of the parol side agreement is incompetent to vary Braniff's written obligations as a subscriber of the exchange. *Super Cold Southwest Co. vs. Elkins* (Texas Sup. Ct.), 166 S. W. (2) 97.

This rule was recognized by the lower Court in *Southwestern Packing Co., Inc., vs. Cincinnati Butchers Supply Co.*, 139 Fed. (2) 201.

The assessment decree is the sole evidence here to the assessment proceedings. There is no evidence that the class, or that Braniff as a member thereof, was improperly represented in those proceedings. The contention that Braniff's side agreement relieved it of its reciprocal un-

dertaking, or afforded a defense thereto, overlooks that this side agreement was an utter nullity and without effect.

In *Hansberry vs. Lee*, 311 U. S. 32; 85 L. Ed. 22; 61 S. Ct. 115, cited below, the right of election defeated the class proceeding. This Court there held the parties did not constitute a class capable of being represented by anyone.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be issued.

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